(1)

Supreme Court, U.S.
FILED

021861 JUN 12 2003

No.

IN THE

Supreme Court of the United States

HIEN AN DAO,

Petitioner

v.

C.A. TERHUNE, Director,
California Department of Corrections,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Sanford H. Perliss, Esq.
Counsel of Record
PERLISS & GROSS
555 S. Flower Street
Suite 4520
Los Angeles, CA 90071
213-627-0218

51 pp

Questions Presented For Review

Did the United States Court of Appeals err when it affirmed the District Court's denial of petitioner's Petition for Writ of Habeas Corpus, where the state court found the admission of a non-testifying accomplice's incriminating statements to be harmless error, contrary to the Confrontation Clause and this Court's opinion in *Lilly v. Virginia,* 527 U.S. 116 (1999).

Table of Contents

	Page
Questions Presented for Review	i
Opinions Below.....	1
Statement of Jurisdiction.....	1
Constitutional Provisions At Issue.....	1
Statutory Provisions At Issue.....	1
Statement of the Case.....	2
Reasons For Granting The Writ.....	7
A. Habeas Standard.....	7
B. Confrontation Clause Framework.....	8
C. Harmless Error Analysis...	12
Appendix	

Table of Authorities

	Page
Cases	
California v. Green, 399 U.S. 149, 158 (1970)	8
Brecht v. Abrahamson, 507 U.S. 619 (1993)	12
Bribiesca v. Galaza, 215 F.3d 1015, 1018 (9th Cir. 2000)	8
Delaware v. Van Arsdale, 475 U.S. 673, (1986)	12
Idaho v. Wright , 497 U.S. 805 (1990)	10
Lilly v. Virginia, 527 U.S. 116 (1999)	i, 9, 10, 11
White v. Illinois, 502 U.S. 346 (1992)	9
Williams v. Taylor, 529 U.S. 362, (2000)	8
Williamson v. United States (1994) 512 U.S. 59	10
Constitutional Provisions	
Sixth Amendment	1
Statutory Provisions	
28 U.S.C. § 2253	7
28 U.S.C. § 2254	2, 7

Opinions Below

The unpublished opinion of the United States Court of Appeals for the Ninth Circuit is set forth in the Appendix at page 3.

The unpublished judgment of the District Court is set forth in the Appendix at page 6.

The unpublished opinion of the California Court of Appeal is set forth in the Appendix at page 8.

The unpublished order of the California Supreme Court is set forth in the Appendix at page 33.

Statement of Jurisdiction

The judgment of the United States Court of Appeals was entered on March 14, 2003. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions at Issue

The question presented for review implicates the following provision of the Constitution of the United States:

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

Statutory Provisions at Issue

The question presented for review implicates the following statutory provision:

28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Statement of the Case

This case involves the denial of a petition for writ of habeas corpus filed by Petitioner Hien An Dao, in which he challenged the constitutionality of his state conviction for first degree murder in July 1998 in Los Angeles County Superior Court. Petitioner appealed his conviction to the California Court of Appeal, which affirmed in an unpublished opinion. Petitioner then filed a petition for

review with the California Supreme Court; this petition was denied on March 15, 2000.

Petitioner filed his petition for writ of habeas corpus with the district court on March 13, 2001. A report and recommendation was issued by a United States Magistrate Judge recommending that the petition be denied on March 21, 2002; this recommendation was adopted by the district court and a judgment was entered on May 17, 2002, dismissing the petition. Petitioner then filed his Notice of Appeal and Request for Certificate of Appealability on June 11, 2002. The district court granted petitioner's request and issued a Certificate of Appealability on June 13, 2002.

On March 14, 2003, the United States Court of Appeals issued an unpublished opinion affirming the judgment of the district court.

Petitioner's allegations of constitutional error center around the admission of incriminating statements made by a non-testifying accomplice. Petitioner alleged that the admission of these statements violated his right to confront the witnesses against him, and that this error was not harmless but extremely prejudicial.

On January 21, 1994, 14 year-old Lin Bao Vuong was shot and mortally wounded outside the Arroyo Pool Hall in El Monte, California. Petitioner Hien An Dao, 16 years old at the time of the shooting, was eventually charged and tried for Vuong's murder, along with two others, Hung Lam and Jason Ching.

On the night of the shooting Vuong was at the pool hall with some friends when he received a page. He and a couple others, including Huy Tieu, went outside so Vuong could use a pay phone. While Vuong was on the phone a blue Honda pulled up next to them. The occupants announced they were members of the "Asian Boyz" gang, and asked the people at the phones if they were rival "Wah

Ching" gang members. Tieu denied he was a member of Wah Ching and the Honda moved forward, then stopped and reversed back to the phones. About the same time a young male Asian ran from the side of the building to the phones and Vuong seemed to recognize him, stating "What's up, Puppet?" Two Asian males got out of the Honda and confronted Vuong and Tieu. The right rear passenger had a silver semi-automatic gun. Several others also exited a brown van and approached Vuong and Tieu. Someone demanded that Tieu hand over his pager which he did. Tieu then ran away after someone threw a punch at Vuong; shortly after that he heard several gunshots. Vuong was struck by five shots and died 3 days later. Though Tieu told police he thought he could identify the front and rear passengers from the Honda, he was never able to identify anyone from photographs or in court.

At trial, Asian Boyz member and accomplice Sat Yu (known as "Mousey") testified for the prosecution. He had been granted immunity and was facing life in prison under the California "Three Strikes Law" if convicted of another felony. Yu testified that both Lam and Dao had guns at the pool hall, that Lam fired a few shots in the air, and that he thought he saw Dao shoot in the direction of the pool hall. Yu admitted that he was one of several who were beating up Vuong before the shots were fired, and he admitted that he lied at the preliminary hearing where he claimed that he was not involved in the assault on Vuong. Yu testified that when he asked later what happened, Dao replied "Ex-Asian Boyz."

Tammy Tran testified at trial that she knew the defendants through her boyfriend, an Asian Boyz member who had been killed before the Vuong shooting. Tran first spoke to police about Vuong's murder while she was in jail, charged with a double murder in the so-called San Marino

case. (ER 168) Tran did not want to spend the rest of her life in jail and would do almost anything to avoid that. She did not think it was a bad thing to be a "snitch" and turn on your friends, if it meant staying out of prison. Tran cooperated with police, was convicted of being an accessory after the fact in the San Marino case, and spent only four months in jail.

Tran testified that three days after the shooting she was at the Travelodge Motel in Pasadena where the defendants and other Asian Boyz had been hanging out. Dao (known as "Tricky") and codefendant Lam (known as "Smurf") were there and she heard them talk about the shooting. Tran testified that Lam had said that he had shot at the guy with a small handgun, .22 or .25 caliber; and that Dao had said that he was there alongside Lam. On cross, Tran later testified that she had told Sgt. Ortega that it was Dao who had said that they had shot someone with a .22 or .25 caliber handgun.

Jimmy Quach testified that he was not a member of the Asian Boyz, but he used to hang out with some members of the gang at that time. On the day of the shooting he was partying with several Asian Boyz at the Travelodge in Pasadena when Sat Yu asked him to borrow his car, a blue Honda Accord, so that he could get some food and find a car to jack. After Sat Yu returned, along with Dao and Lam and several others, Dao was excited and Lam was quiet. According to Quach, Dao yelled out to everyone not to say anything or he would kill them, and later said that he'd shot some fool at Arroyo Pool Hall.

Sgt. Ortega interviewed Cuong Phan (known as "Scrubby") in February 1995, thirteen months after the shooting. At the time Phan was in custody, charged with murder in the San Marino case. He was subsequently convicted of murder in that case and sentenced to two

consecutive life terms. After the Arroyo Arcade case began, the prosecutor informed the judge in the San Marino case that Phan was cooperating; Phan was then resentenced to two concurrent life terms, though the judge indicated the change was not due to Phan's cooperation.

At the time of trial, Phan changed his mind and refused to testify, claiming to be afraid for his life. Phan refused to testify even though he had been granted immunity, and even though the prosecutor had offered to write a letter to the Board of Prison Terms informing them of his cooperation (and threatening that he might send a letter informing them of his refusal to cooperate if he did not testify). The trial court then granted the prosecutor's motion to introduce statements made by Phan through Sgt. Ortega.

According to Sgt. Ortega, Phan admitted being present at the Arroyo Arcade at the time of the shooting. He rode there in the van with several other Asian Boyz, including Ching. They were accompanied by Quach's Honda, driven by Sat Yu. Dao, Lam and a fourth person, John, were also in the Honda. Phan saw Dao armed with what he thought was a .380 chrome automatic handgun. He also believed Lam was armed, but never saw him with a gun. Phan and Ching got out of the van; Phan went to the front door of the arcade with a stick in his hands. Phan confronted a person by the door and "hit him up," i.e., asked him what gang he was from. Phan heard gunshots, but did not actually see the shots being fired.

At the conclusion of the trial the jury convicted Dao of murder with an enhancement for personal use of a firearm, and he was sentenced to 30 years to life. Lam was convicted of second degree murder, and Ching was acquitted.

Petitioner raised the Confrontation Clause issues in

his appeal to the California Court of Appeal, and in his petition for review to the California Supreme Court.

The district court had jurisdiction to consider the petition for writ of habeas corpus pursuant to 28 U.S.C § 2254. The Court of Appeals had jurisdiction to hear the appeal of the denial of the petition under 28 U.S.C. § 2253.

Reasons for Granting the Writ

This Court should grant the writ of certiorari and review the decision of the Ninth Circuit Court of Appeals in this case. The Court of Appeals, like the state appellate court, found that any error in the admission of the Phan statements was harmless. This conclusion constitutes an unreasonable application of federal law for which habeas relief should have been granted.

A. Habeas Standard

Pursuant to the changes enacted by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), federal habeas law, as set forth in 28 U.S.C. § 2254(d), now provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a

> decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This Court has held that a federal court may grant a writ of habeas corpus under the "unreasonable application" clause "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the [petitioner's] case. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). The Court of Appeals reviews the district court's denial of habeas relief de novo. *Bribiesca v. Galaza*, 215 F.3d 1015, 1018 (9th Cir. 2000).

B. Confrontation Clause Framework

The Sixth Amendment to the United States Constitution provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The right to confrontation serves the purposes of insuring reliability by means of oath, exposing the witness to cross-examination, and permitting the trier of fact to weigh the demeanor of the witness. *California v. Green*, 399 U.S. 149, 158 (1970).

This Court recently examined the constitutionality of admitting one codefendant's out-of-court statements to inculpate another in *Lilly v. Virginia*, 527 U.S. 116, 143, (1999).

> During a custodial interrogation, Mark Lilly told police officers that petitioner committed the charged murder. The prosecution introduced a tape recording of these statements at trial without making Mark available for cross- examination. In my view, that is a paradigmatic Confrontation Clause violation. *Lilly*, 527 U.S. at p. 143 (Scalia, concurring in judgment); *White v. Illinois*, 502 U.S. 346, 364-365, 112 S. Ct. 736, 116 L.Ed.2d. 848 (1992)

> The confession of the accomplice, Mark Lilly, covers 50 pages in the Joint Appendix, and the interviews themselves lasted about an hour. The statements of Mark Lilly which are against his penal interest--and would probably show him as an aider and abettor--are quite separate in time and place from other statements exculpating Mark and incriminating his brother, petitioner Benjamin Lilly, in the murder of Alexis DeFilippis. *Lilly*, 527 U.S. at p. 145 (Rehnquist, concurring in judgment).

> The critical question is whether "the circumstances surrounding [the] statements bore 'particularized guarantees of

> trustworthiness,' [citation] sufficient to satisfy the Confrontation Clause's residual admissibility test." [citation] There also must be a "fact-intensive inquiry" to determine "whether each of the statements in [the] confession was truly self-inculpatory." (*Williamson v. United States* (1994) 512 U.S. 594, 604.)

Such an inquiry "would require careful examination of all the circumstances surrounding the criminal activity involved." *Id.*

The state appellate court never addresses the issue of whether each of the statements was truly self-inculpatory. In this case, as in *Lilly, supra*, the statements which were arguably self-inculpatory were completely separate from those statements which tied Dao to the murder.

While Phan's statements placing himself at the scene armed with a stick are barely self-inculpatory, his statements placing Dao at the scene armed with a chrome automatic handgun were "not in the least against" Phan's penal interest. *See Lilly* (Rehnquist, J., concurring).

Further, in order for statements to be admissible under the residual "trustworthiness" test, it must be an **exceptional** case where the court is confident that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." *Id.* (quoting *Idaho v. Wright* , 497 U.S. 805, 820 (1990)) In addition, accomplice statements which attempt to shift or spread blame are inherently unreliable:

> Nonetheless, the historical underpinnings of the Confrontation Clause and the sweep of

> our prior confrontation cases offer one cogent reminder: It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice -- that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing.

Lilly, *supra*, 527 U.S. at p. 137.

The state appellate court's conclusion that the challenged statements qualify under the residual "trustworthiness" test is clear error for which habeas relief is appropriate.

The first proffered basis of reliability, that the police did not make any offer of leniency to Phan, does not help the state here, as the Supreme Court rejected a similar claim in *Lilly*:

> Similarly, the absence of an express promise of leniency to Mark does not enhance his statements' reliability to the level necessary for their untested admission. The police need not tell a person who is in custody that his statements may gain him leniency in order for the suspect to surmise that speaking up, and particularly placing blame on his cohorts, may inure to his advantage.

Lilly, 527 U.S. at p. 139.

The state appellate court then cites to Phan's refusal to testify at trial as an additional indicia of reliability of **his earlier statements to police**. First, Appellant submits that this could never constitute a valid indicia of reliability in a Confrontation Clause case. If it could, then the Confrontation Clause would have no force. It is only because the declarant has refused to testify that the issue arises. Second, the surmise that the declarant's refusal to testify shows his prior statements were not motivated by a desire to curry favor with the police ignores common sense. Petitioner submits that it is much easier for a gang member to spread and shift the blame when being questioned by police, then it is for the same gang member to testify in open court against a fellow gang member. That a gang member refuses to testify against a fellow gang member cannot be used to bolster the reliability of earlier statements made during a custodial interrogation.

C. Harmless Error Analysis

Confrontation Clause violations are subject to harmless error analysis. *Delaware v. Van Arsdale*, 475 U.S. 673, 681-84 (1986). In order for errors to be considered "harmless" and therefore not a basis for reversal, it must be determined they did not have a substantial and injurious effect on the verdict. *Brecht v. Abrahamson,* 507 U.S. 619 (1993). No such conclusion can be reached in this case.

The damaging information provided by Phan was admitted through Sgt. Ortega after Phan refused to testify. At that point, the only non-gang affiliated witness who testified regarding the shooting of Vuong was his friend Tieu, who never identified Dao or anyone else as being present at the scene. All the other witnesses were tainted,

as acknowledged by Justice Mallano in his dissent of the California Court of Appeal's opinion:

> Further, I cannot agree that the error regarding the admission of Phan's statement was nonprejudicial. The other witnesses placing Lam and Dao at the scene were not without taint: Yu (an accomplice), Tran (a charged accomplice in a homicide case at the time of her testimony) and Quach (who lent his car to Yu on the date of the homicide to facilitate a robbery and obtain food).

Appendix, p. 31.

Yu was facing life in prison under the "Three Strikes" law if convicted of another felony. He admitted driving the Honda to the scene of the shooting, admitted he was one of those beating up on Vuong, and admitted that he lied under oath at the preliminary hearing when he said that he was not involved in the assault of Vuong prior to shots being fired.

Tran first spoke to police about Vuong's murder while she was in jail, charged with murder in the San Marino case. Tran did not want to spend the rest of her life in jail and would do almost anything to avoid that. She did not think it was a bad thing to be a "snitch" and turn on your friends, if it meant staying out of prison.

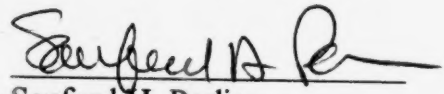
Quach was an admitted associate of the Asian Boyz, and willingly allowed his car to be used so that gang members could find a car to rob. While he claimed that it did bother him that his vehicle was used to hurt someone, he never went to the police on his own to tell them what he knew.

The admission of Phan's statement was not cumulative but bolstered the shaky evidence from the tainted witnesses, and placed Dao at the scene armed with a chrome automatic handgun, linking him to the description given by Tieu of the rear passenger from the Honda, who he identified as holding a "silver" automatic handgun. Consequently, the admission of the Phan statement was not harmless, but was extremely prejudicial, and the state appellate court's and court of appeals' opinions to the contrary were clearly in error.

Conclusion

For the reasons set forth above, Petitioner Hien An Dao respectfully prays that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,



Sanford H. Perliss
Counsel of Record
PERLISS & GROSS
555 S. Flower Street
Suite 4520
Los Angeles, CA 90071
213-627-0218

APPENDIX

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 02-56057
CT/AG#: CV-01-02422-AHM

HIEN AN DAO

Petitioner -- Appellant

v.

C.A. TERHUNE, Director, California Department of Corrections

Respondent -- Appellee

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here

ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered March 14, 2003

FILED
MAR 14 2003

CATHY A.CATTERSON,
CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HIEN AN DAO, Petitioner -- Appellant, v. C.A. TERHUNE, Director, California Department of Corrections, Respondent -- Appellee.	No. 02-56057 D.C. No. CV-01 -02422-AHM MEMORANDUM*

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3

Appeal from the United States District Court
for the Central District of California
A. Howard Matz, District Judge, Presiding
Argued and Submitted February 7, 2003
Pasadena, California

BEFORE: D.W. NELSON, WARDLAW and FISHER, Circuit Judges.

Appellant Hien An Dao appeals the district court's dismissal of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We have jurisdiction pursuant to 28 U.S.C.
§§ 1291 and 2253, and we affirm.

We review de novo the district court's denial of a petition for a writ of habeas corpus. *Benn v. Lambert*, 283 F.3d 1040, 1051 (9th Cir.), *cert. denied*, 123 S.Ct. 341 (2002). We may not grant relief unless the state court's adjudication of Dao's claims "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). We are not permitted to substitute our judgment for that of the state court. *Woodford v. Visciotti*, 123 S.Ct. 357, 360 (2002), *reh'g denied*, 123 S.Ct. 341 (2003).

Dao contends that the trial court's admission of nontestifying accomplice Cuong Phan's out-of-court statements violated his rights under the Confrontation Clause of the Sixth Amendment. Like the California Court of Appeal, we decline to decide whether the admission of the statements violated the Sixth Amendment, because even if we assume that a Confrontation Clause violation occurred, the error was harmless. Phan's statements, which placed Dao at the murder scene with a gun of a different

caliber from the murder weapon, were corroborated by the far more damaging testimony of Sat Tai Yu, who stated that he saw Dao fire shots with a .25 caliber gun at the murder scene, and Jimmy Quach and Tammy Tran, both of whom testified that Dao admitted to the murder, moreover, the government did not rely heavily on Phan's statements in its closing argument, and the court instructed the jury that it was not to consider the testimony of accomplices unless that testimony was corroborated by other evidence. Any error in the admission of the statements therefore did not have a "substantial and injurious effect" on the jury's verdict, *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993)(internal quotation marks omitted), and the California Court of Appeal's conclusion that the error was harmless was not contrary to or an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1). The judgment of the district court is AFFIRMED.

AFFIRMED.

ENTERED
CLERK, U.S. DISTRICT COURT
MAY 17 2002
CENTRAL DISTRICT OF CALIFORNIA

FILED
CLERK, U.S. DISTRICT COURT
MAY 16 2002
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HIEN AN DAO, Petitioner, vs. C.A. TERHUNE, Director, California Department of Corrections Respondent.	) Case No. CV 01-2422-AHM(RC)))) JUDGMENT)

Pursuant to the Order of the Court adopting the findings, conclusions, and recommendations of United States Magistrate Judge Roasalyn M. Chapman,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is denied and the action is dismissed with prejudice.

DATE: May 16, 2002 s/

A. HOWARD MATZ
UNITED STATES
DISTRICT JUDGE

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	)	B 125477
	)	
	)	(Los Angeles County
Plaintiff and Respondent,	)	Super. Ct. No. KA03
	)	5193)
	)	**COURT OF**
v.	)	**APPEAL --**
	)	**SECOND DISTRICT**
HUNG XUONG LAM et al.,	)	**DEC 13 1999**
(HIEN AN DAO)	)	
	)	**JOSEPH A. LANE**
	)	CLERK
	)	
Defendants and Appellants.	)	

APPEALS from judgments of the Superior Court of Los Angeles County.
Robert Gustaveson, Judge. Affirmed.

Thomas T. Ono and Marleigh A. Kopas, under appointinents by the Court of Appeal, for Defendants and Appellants.

Bill Lockyer, Attomey General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Pamela C, Hamanaka, Supervising Deputy Attorney General, Roy C. Preminger, Deputy Attorney General, for Plaintiff and Respondent.

Appellants, Hung Xuong Lam and Hien An Dao, were jointly tried by a jury for the murder of Lin Bao Vuong.[1] Lam was convicted of murder in the second degree with findings that a principal was armed with a firearm and that the offense was committed in association with a criminal street gang. The allegation that Lam personally used a firearm was found untrue. Dao was convicted of murder in the first degree with findings that a principal was armed with a firearm, that Dao personally used a firearm, and that the offense was committed in association with a criminal street gang. Lam was sentenced to a prison term of 16 years to life. Dao was sentenced to a prison term of 30 years to life.

Both Lam and Dao contend: the trial court erred in

---

1. Codefendant Jason Ching was also tried with appellants for the murder but was acquitted.

admitting extrajudicial statements of accomplice Cuong Phan (also known as "Scrubby"); the trial court erred in denying the defense request for a continuance during trial; and the prosecutor improperly commented during closing argument on appellants' failure to testify. Additionally, Dao contends there was insufficient evidence the killing was done with the willfulness, premeditation and deliberation required for first degree murder, and Lam asserts instructional error as to the natural and probable consequences doctrine and the failure to give an involuntary manslaughter instruction.[2] We find the contentions unavailing and affirm.

---

2. Lam specifically joins on appeal with codefendant Dao's contentions to the extent they are applicable to him. However, Lam contests Dao's characterization of Lam as the shooter and asserts the shooter was more likely another gang member, "Puppet," who first ran up and instigated the violence on Vuong. After Dao filed his opening brief in the present appeal, he filed a letter brief joining in certain arguments raised by Lam.

FACTS

The Asian Boyz gang and the Wah Ching gang are criminal street gangs, which in 1994 were rival gangs at war with each other. In January of 1994, Dao, Lam, Ching and Sat Tai Yu were members of the Los Angeles chapter of the Asian Boyz gang. A member of the Wah Ching gang had recently shot Yu in the leg. During that January, Dao, Lam, Ching, Yu and Jimmy Quach (who associated with the Asian Boyz gang but was not a member) "partied" for a couple of weeks in a room at the Travel Lodge Motel on Colorado Boulevard in Pasadena.

On January 21, 1994, Lam had a small semiautomatic handgun in the motel room. He shared the gun with Dao. They would not let anyone else touch the weapon. Ching and another person in the motel room also had a gun. At approximately 8 p.m. that evening, Yu asked Quach if he could borrow Quach's car, a blue Honda. Quach agreed, and Yu said he was going to get some food for the group and to rob a car so they would have money for the motel room and other expenses.

Yu drove away with Quach's car and was accompanied by Lam and Dao and another member of the Asian Boyz named John. Yu observed that both Lam and Dao had guns in their possession. Yu drove the Honda and followed a van driven by another member of the Asian Boyz named Player. Other Asian Boyz gang members, Ching, Phan, Peter, Vincent, Teaser and Hitman, were also in the van. Yu followed the van to the Pasadena Arcade, and soon thereafter followed it to the Arroyo Pool Hall in El Monte.

Huy Huu Tieu, his uncle Mark, Lin Bao Vuong (also known as Mike), Tan Vuong, and two girls, Kim and Linn, had arrived at the pool hall at approximately 8:30 p.m.

While they were shooting pool, Lin Bao Vuong received a page on his pager from one of his friends. Lin Bao Vuong, Tieu, Tan Vuong and a person referred to as Hoan then went outside to a telephone booth near the pool hall door, and Lin Bao Vuong made a telephone call.

While Lin Bao Vuong was speaking on the phone, Yu drove into the pool hall parking lot. He stopped the Honda in front of the phone booth after Lam told him to stop the vehicle. Everyone inside the Honda identified himself as associated with the Asian Boyz and asked Tieu, Lin Bao Vuong and the others at the phone booth if they were from Wah Ching. John and Dao got out of the Honda. Dao held a semiautomatic handgun, and John made motions in the area of his waistband as if he had a weapon there. Dao and John both said, "Fuck Wah Ching." When Tieu protested he was not from Wah Ching, Dao and John got back inside the Honda.

The Honda was driven away from the phone booth, but then backed up and returned to the area. A young Asian male ran from the side of the pool hall building up to the phone booth. Lin Bao Vuong said, "What's up, Puppet?" All the occupants of the Honda got out and went with Puppet to where Tieu and Lin BaoVuong were standing. One of the people from the Honda demanded that Tieu give him his pager and money. Tieu handed over his pager but did not have any money with him.

Tieu ran away after he saw one of the people punch Lin Bao Vuong. Ching ran up from the van and also punched Lin Bao Vuong in the body and face. As Ching punched him,he stated "Ex-AsianBoyz" andasserted Lin Bao Vuong had joined the Wah Ching gang. Yu and two other Asian Boyz members also joined in hitting Lin BaoVuong. Meanwhile, Phan held a stick or pole as he challenged a person near the entrance to the pool hall, asking him what

gang he was from.

Yu walked back to the Honda and told Lam and Dao to leave. Lam fired two shots into the air, and Dao turned around and fired one to three shots. Lam and Dao got back into the Honda, and then both the Honda and the van returned to the Travel Lodge Motel. That evening at approximately 10 p.m., El Monte Police Officer Dennis Miller arrived at the Arroyo Pool Hall and observed Lin Bao Vuong lying on the ground near the phone booth outside the pool hall. He was still alive, and paramedics were called to the scene. Officer Miller found three expended small caliber bullet casings in the parking lot near the victim. Thereafter, El Monte Police Detective Kenneth Whary arrived at the scene and observed, in addition to the three expended .25 caliber casings found by Officer Miller, an expended bullet on the ground.

At the Travel Lodge Motel that evening, Quach observed that Dao was jumpy and excited and that Lam was rather quiet. Lam had a gun, and Quach saw him hide the weapon in a laundry bag in the motel room. Dao yelled out that no one should say anything, or he would kill him. Dao also said that in case anyone asked, they should say that Puppet from the Hellside gang did it. Dao also indicated that the whole group, including Lam and Ching, had been at the Arroyo Pool Hall. While the people in the motel room were talking, Quach heard them say they thought the victim was Mike or Mickey.

Several days later, Dao told Yu that he had thrown his gun in the sewer. Yu asked Dao what had happened. Dao replied, "Ex-Asian Boyz." Dao also said, "I think I shot him." Sometime after Lin Bao Vuong had been shot, Tam Tran, a girlfriend of one of the Asian Boyz, was present in the motel room at the Travel Lodge Motel. She heard Lam say he had shot "the guy" at close range with a .22 or .25 caliber gun, and that the person who got shot was an ex-Asian Boyz member who had joined the Wah Ching gang.[3] Lam and Dao also told Tran that they were together when it happened, and they had used a Honda Accord. Dao further indicated to Tran that at the time of the incident there were some young girls in front of the pool hall.

On January 24, 1994, Detective Whary returned with his partner to the scene of the shooting. They discovered on the ground two additional expended bullets. Lin Bao

---

3. On cross-examination, Tran testifted it was Dao, not Lam, who had told her that they killed a person with a.22 or.25 caliber handgun. At the time of her testimony, Tran was on probation for her role as an accomplice in the so-called San Marino murder case, in which two people had been killed.

Vuong had died from a gunshot wound to the head. An autopsy indicated he had several bruises about his body and five gunshot wounds, including a fatal through-and-through wound to the head. The bullet entered the left back of his head and exited at his right eyebrow. Vuong also sustained one bullet wound to the left arm, one wound to the left thigh, and two wounds to the right thigh. The coroner also observed a partially removed Asian Boyz tattoo on one arm. Vuong was 14 years old at the time he was killed.

In October of 1994, Los Angeles County Sheriff Sergeant Rudy Ortega interviewed Quach. Quach stated that Dao had told him that Dao had shot the victim and had gotten away with it. Sergeant Ortega thereafter interviewed Yu who stated he had seen Lam in possession of a black .22 caliber automatic before anybody left Quach's vehicle. Ballistics tests disclosed that the expended bullets found at the scene of the shooting and the two bullets recovered from the victim's body were .25 caliber bullets, which could have been fired from the same gun.

Los Angeles County Sheriff Sergeant William Howell testified at trial as an expert on Asian gangs in Los Angeles County. According to him, Asian Boyz gang members would not spontaneously engage in a violent act. Assuming members of that gang were involved in the homicide of Lin Bao Vuong, Sergeant Howell opined they committed the crime to promote the Asian Boyz gang by instilling fear in any rival gang and giving the Asian Boyz respect.

In appellants' defense at trial, Kenneth Chang, an acquaintance of Dao's defense counsel, indicated that it is possible to join the Asian Boyz gang and thereafter to leave the gang. A person could leave the gang by getting "jumped out," meaning leaving after several older boys beat up the departing gang member. Chang had left the gang after approximately a year and knew of several others who

also were former Asian Boyz members. While Chang was a member, it was primarily a social group and did not engage in major crimes.

DISCUSSION

I. The trial court properly admitted Phan's statement to Sergeant Ortega as a declaration against interest and did not abuse its discretion in denying a continuance before cross-examination of Sergeant Ortega

Appellants both contend the trial court erred in permitting Sergeant Ortega to testify, pursuant to the declaration against penal interest exception to the hearsay rule (Evid. Code, § 1230), regarding out-of-court statements that had been made to him by Cuong Phan ("Scrubby"), an Asian Boyz member who was also an accomplice.[4] Appellants assert the trial court erred in

---

4. The trial court instructed the jury that if the crime of murder was committed by anyone, Phan was an accomplice as a matter of law, and further admonished the jury as to how to view evidence from an accomplice.

Phan's contested statements, as related through the testimony of Sergeant Ortega, who interviewed Phan in February of 1995, included Phan's acknowledgment that he was one of the passengers in the van which left the motel and eventually drove to the Arroyo Pool Hall. Phan told Sergeant Ortega the names of the people in the van with him and that Dao was armed with a .38 caliber semiautomatic pistol. Accompanying the van was the Honda, in which Dao, Lam, Yu and another person rode. When Phan was at the pool hall, he saw Dao waving the gun inside the Honda. He also saw the people from the Honda approach those by the phone booth. Ching got out of the van and ran over to the group by the phone booth, while Phan went to the entrance of the arcade, held a stick or pole, and issued a gang challenge to someone at the entrance by asking what gang he was from.

Phan further related to Sergeant Ortega that Ching hit one of the people in the group by the phone booth. Someone from Phan's group

finding Phan was unavailable as a witness, erred in failing to conduct a fact-intensive inquiry as to whether the statement constituted a declaration against penal interest, and erred in finding his statements to the police sufficiently trustworthy. In a related matter, appellants contend the court should have granted a continuance to prepare for cross-examination of Sergeant Ortega regarding Phan's declarations against interest.

A party who proposes that an out-of-court statement be admitted as a declaration against penal interest "must show that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character." *(People v. Cudjo* (1993) 6 Cal.4th 585, 607.) A trial court's determination that a statement is admissible, pursuant to the declaration against interest exception to the hearsay rule is reviewed on appeal for abuse of discretion. *(Ibid, People v. Frierson* (1991) 53 Cal.3d 730, 745.)

Admission of the untested confession of a nontestifying accomplice, however, may violate a defendant's constitutional right to confront witnesses. *(Lilly v. Virginia* (1997) 527 U.S. ___ [144 L.Ed.2d 117] *(Lilly).)* An accomplice's statement against penal interest as an exception to the hearsay rule is neither a "firmly rooted" exception nor a category of evidence containing "'particularized guarantees of trustworthiness '" (id. at pp.___, ___ [144 L.Ed.2d at pp. 133, 134]), such that

---

also took a pager from one of the people in the group by the phone booth. Phan then heard gun shots, but he did not tell Sergeant Ortega who fired the shots. Phan asserted he did not see Lam shoot a gun, hold a gun, or run away.

adversarial testing would likely add little to the statements' reliability. Nonetheless, no majority of the Justices in *Lilly* established any blanket ban on such incriminating statements by an accomplice. (id. at pp. ___[144 L.Ed.2d at pp. 139, 141].) The critical question is whether "the circumstances surrounding [the] statements bore 'particularized guarantees of trustworthiness.' [citation] sufficient to satisfy the Confrontation Clause's residual admissibility test." *(Id.* at pp. ___ [144 L.Ed.2d at pp. 122-123].) There also must be a "fact-intensive inquiry" to determine "whether each of the statements in [the) confession was truly self-inculpatory." *(Williamson v. United States* (1994) 512 U.S. 594, 604.) Such an inquiry "would require careful examination of all the circumstances surrounding the criminal activity involved." *(lbid.;* see also *People v. Greenberger* (1997) 58 Cal.App.4th 298, 334, 336.)

In the present case, the trial court held a hearing regarding the admissibility of Phan's statements to Sergeant Ortega. The trial court reviewed a copy of the Prosecutor's written motion to admit Phan's statements as declarations against Phan's interests and had a copy of the transcript of the sergeant's interview with Phan. At least since the time of the preliminary hearing, defense counsel also had a copy of the transcript of the interview, as well as the sergeant's police report detailing his interview with Phan. Appellants' trial counsel also either were present at or had access to the transcript of the preliminary hearing during which Sergeant Ortega testified at length regarding his interview with Phan.

It is thus apparent that during the trial court hearing on the admissibility of Phan's statements, appellants' trial counsel were in a position to argue exactly which portion or portions of Phan's statements they claimed were

inadmissible and for what reason. Counsel's request for a continuance was not based on an adequate showing of good cause (Pen. Code, § 1050, subd. (e)), and the trial court did not abuse its broad discretion or thwart the constitutional right to the effective assistance of counsel in denying the request for a continuance.[5] (See *People v. Hawkins* (1995) 10 Cal.4th 920, 945; *People v. Howard* (1992) 1 Cal.4th 1132, 1171.)

And, the trial court considered sufficient evidence and argument to enable it to make an informed decision on the admissibility of the statements. The hearing entailed an adequate fact-intensive inquiry.

Moreover, the trial court correctly ruled that Phan's statements, as testified to by Sergeant Ortega, were admissible as declarations against interest. Phan made it clear that although he was offered use immunity and thus could not invoke his privilege against self-incrimination, he would refuse to testify under any circumstances since he feared for his life if he testified. In fact, at one point while Phan and codefeadant Ching were in the same bus en route to court, Ching threatened Phan. Phan continued to refuse to testify even after the trial court held him in contempt for not testifying and advised him that the district attorney's office could also bring criminal contempt charges against him. The trial court properly concluded Phan was unavailable as a witness. (See *People v. Stritzinger* (1983)

---

5. Lam's counsel joined in the request of codefendant Ching's counsel to give the defense a couple of days to prepare on the admissibility issue. Dao's counsel did not specifically join in the request for a continuance. However, before Sergeant Ortega's testimony, counsel for Dao indicated he was "not prepared." And, after Sergeant Ortega's testimony on direct examination, counsel for Dao stated, "I am not prepared at this time and would request --" possibly intending to request a continuance to cross-examine the officer.

34 Cal.3d 505, 518; *People v. Rojas* (1975) 15 Cal.3d 540, 549-552; Evid. Code, § 240, subd. (a)(3)-)

The trial court also correctly concluded that Phan's statements to Sergeant Ortega were statements against his penal interests. The statements were sufficient to subject Phan to criminal liability for the murder of Lin Bao Vuong as an aider and abettor in appellants' killing of Vuong. (Pen. Code, § 31.)

On the constitutional right to confrontation issue, respondent urges that the trial court's finding that Phan's statements were trustworthy was adequately supported by the fact that Phan exposed himself to criminal liability for the murder of Vuong. Phan also gave an extremely detailed statement of the incident. Respondent also notes that several Justices in *Lilly* observed that although the declarant in *Lilly* made some statements "which are against his penal interest - and would probably show him as an aider and abettor - [they] are quite separate in time and place from other statements exculpating [himself] and incriminating [defendant] .... [¶] ... [The declarant's] statements inculpating [defendant] in the murder of [the victim] are not in the least against [the declarant's] penal interest." *(Lilly v. Virginia, supra,* 527 U.S, at pp.___, ___ [144 L.Ed.2d at pp. 139, 140] (conc. opn. of Rehnquist, C.J.).) Respondent reasons that because the declarant in Lilly exculpated himself while incriminating the defendant, his statements were less reliable than Phan's statements, which implicated himself and thus pass constitutional muster.[6] In view of all the circumstances, respondent urges

---

6. Moreover, Sergeant Ortega did not make any promise of leniency when Phan made the statements. The trial court was aware that Phan was a defendant in a San Marino murder case and had been sentenced in that case prior to the start of appellants' trial. Phan's counsel in the

the statements are sufficiently trustworthy to satisfy the Confrontation Clause.

We find that even assuming arguendo error regarding the admission of Phan's statements through the testimony of Sergeant Ortega, any error was nonprejudicial. Appellants emphasize that Phan placed appellants at the crime scene and Dao was the only person Phan claimed to see armed. Yu had been granted immunity and was an accomplice. Nonetheless, Yu testified that both Dao and Lam fired shots just after Vuong was beaten. Nonaccomplice Tran testifted that Dao told her he and Lam had killed a person with a.22 or .25 caliber handgun. A bullet from a .25 caliber gun in

---

San Marino murder case, an alternate public defender, had asked the prosecutor in the present case to advise the judge in the San Marino murder case that Phan was going to cooperate with the prosecution in the present case. The prosecutor thus sent the judge in the San Marino murder case a letter stating that Phan's counsel in that case had said that Phan would agree to testify in the present case if the judge in the San Marino murder case was informed of Phan's cooperation. After receiving this letter, the judge in the San Marino murder case sentenced Phan to two concurrent terms of life imprisonment. However, the sentencing was "completely apart from any cooperation" that Phan might render in the present case.

Phan was subpoenaed as a witness by the prosecution in the present case. The prosecutor had drafted a letter addressed to thc Board of Prison Terms which stated that Phan had testified truthfully in the present case and this testimony was extremely helpful the prosecution. The prosecutor advised Phan that he would send this letter if in fact Phan cooperated. He also advised Phan that in the event Phan refused to testify he would send a letter to thc Board of Prison Terms advising them of Phan's failure to cooperate.

Phan's refusal to testify thus could indicate his prior statements to the officer were not "motivated by a desire to curry favor with the authorities." *(Williamson v. United States, supra,* 512 U.S. at p. 60 1 .) He, in fact, exposed himself to the prosecutor's damaging letter to be sent to the Board of Prison Terms by his refusal to testify at trial.

fact killed Vuong. Nonaccomplice Quach testified that after the fatal shooting, he saw Lam hide a gun in a laundry bag in the motel room, and Dao yelled that no one should say anything or he would kill him. Dao also said the entire group, including Lam and Ching, had been at the Arroyo Pool Hall. Several days later, Dao told Yu that he had thrown his gun in the sewer. When Yu asked Dao what had happened, he replied "Ex-Asian Boyz," and said, "I think I shot him," Quach told Sergeant Ortega that Dao told him that Dao shot the victim and got away with it. Quach was not an accomplice or involved in any pending criminal matter.

We also note that Sergeant Ortega's testimony about Phan's statement was, in view of the testimony of other witnesses, actually of some assistance to appellants. Phan placed Dao at the scene waving a gun around. However, Phan indicated that Dao was in possession of a .38 caliber gun (not a .25 caliber gun), and that he did not see who fired the shots. Phan also indicated he did not see Lam with a gun. Indeed, consistent with Phan's testimony, the jury found Lam had not used a weapon and was convicted of the lesser offense of second degree murder.

Under such circumstances, it is most unlikely the jury would have rendered a verdict more favorable to appellants if Sergeant Ortega had not testified at all regarding Phan's statements to him. Accordingly, even assuming arguendo error in admitting Sergeant Ortega's testimony about Phan's statements to him, under any standard of review its admission would be harmless. (See *People v. Gordon (1990)* 50 Cal.3d 1223, 1253-1254; *People v. Leach (1975)* 15 Cal-3d 419, 445.)

II. The prosecutor did not comment on appellants' failure to testify

Lam and Dao both contend the prosecutor improperly commented on their failure to testify at trial. Specifically, in closing argument the prosecutor stated as follows: "Each of the defense counsel has gone on at great length as to why the prosecution's witnesses . . . are liars. [¶] Fine, suppose they are not telling the truth. I'm not exactly quite sure what counsel is then saying. Were each of the defendants not there that night? Were each of the defendants there but doing something else and weren't involved that night? It's never made clear. Hmm. [¶] So if [the defendants] weren't doing what the witnesses for the prosecution said they were doing, what were they doing? And if they weren't there in the Arroyo Arcade that night with their gangster homeboys, where were they? There is no other evidence." After appellants objected, the prosecutor thereafter remarked, "There is no other evidence concerning what they were doing or where they were other than that presented by the prosecution's witnesses and it's all consistent." Appellants also moved for a mistrial or, alternatively, for an admonition to the jury. They further noted that the prosecutor "wrote it on the board. He said, where were they? What were they doing . . . [¶] . . . It's not just words, it was written for the jury . . . ."

To ensure that an accused is not penalized for invoking his right not to testify, the prosecutor in a criminal case may not comment on a defendant's failure to testify nor ask the jury to infer guilt from the defendant's failure to testify. *(Griffin v. California (1965)* 380 U.S. 609; *People v. Hardy* (1992) 2 Cal.4th 86,153-154.) "[E]rror is committed whenever the prosecutor or the court comments, either directly or indirectly, upon defendant's failure to testify." *(People v. Morris* (1988) 46 Cal.3d 1, 35.) However, the rule "does not extend to [a prosecutor's] comments on the state of the evidence, or on the failure of the defense to

introduce material evidence or to call logical witnesses." (*People v. Medina* (1995) 11 Cal.4th 694, 755; *People v. Morris, supra,* at p. 35.)

Moreover, "brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error." *(People v. Hovey* (1988) 44 Cal.3d 543, 572; *People v. Ghent* (1987) 43 Cal.3d 739, 771.) And, "a prosecutor is justified in making comments in rebuttal, perhaps otherwise improper, which are fairly responsive to argument of defense counsel and are based on the record." *(People v. Hill* (1967) 66 Cal.2d 536, 560; see *People v. Daya (I* 994) 29 Cal.App.4th 697, 715.)

In the present case, contrary to appellant's contention, the prosecutor during rebuttal argument did not improperly comment on appellants' failure to testify. Rather, the comments complained of refuted the closing arguments of defense counsel which in essence asserted that appellants should be acquitted because the prosecution witnesses affiliated with the Asian Boyz gang were not credible. But, defense counsel failed to explain appellants' presence at the scene or to contradict any evidence, which placed them at the scene when the victim was killed. The prosecutor's remarks also constituted proper comments on the state of the evidence, as no evidence indicated appellants were not present at the time of the shooting.

Respondent also notes there were numerous people other than those who testified at trial who were present in pool hall parking lot when the victim was killed. These other witnesses could apparently have testified that appellants were not present, if in fact that had been the case. Thus, the prosecutor correctly pointed out during his rebuttal argument there was no evidence presented other than that appellants were at the scene of the shooting at the

time of the killing. Accordingly, the prosecutor's comments and his writing on the board ("Where were they?") did not improperly refer to appellants' failure to testify.

Even assuming the comments could be deemed improper implied comments on appellants' failure to testify, the error would be nonprejudicial. The comments were brief and did not specifically ask the jury to infer guilt from the failure to testify. The jury was also properly instructed as follows: appellants had a constitutional right not to testify; no inference could be drawn from their failure to testify; not testifying could not be discussed or enter into the jury's deliberations; in deciding not to testify, appellants could rely on the state of the evidence and the failure, if any, of the prosecution to prove guilt beyond a reasonable doubt; and no lack of testimony on appellants' part could make up for a failure of proof by the prosecution. We must presume the jury followed such admonishments. (See *People v. Bonin* (1988) 46 Cal.3d 659, 699.) Accordingly, any *Griffin* error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, *24; People v. Mincey* (1992) 2 Cal.4th 408, 447.)

III. Substantial evidence supports Dao's conviction for first degree murder

Dao contends the evidence was insufficient to support the finding that he committed the murder of Lin Bao Vuong with the requisite willfulness, premeditation and deliberation required for first degree murder. (See *People v. Anderson* (1968) 70 Cal.2d 15, 26.) Dao urges that the evidence points to Lam as the person who actually shot Vuong, and that Vuong's killing was "a rash, impulsive shooting after a chance encounter of immature gang members." Dao contends there was "no evidence of retaliation, prior planning of the shooting, preparation of

the weapon, a predesigned location, or of maneuvering to facilitate [the] shooting." (Emphasis in original.) According to Dao, the manner of the killing "suggests nothing more than an intent to shoot or injure, not a preconceived design to kill."

Although Dao asserts the evidence points not to him but to Lam as the shooter, Yu saw Dao fire one or more shots at the time of the fatal shooting. Several days after the shooting, Dao told Yu that he thought he had shot the victim. Dao also told Quach that he shot the victim and got away with it. The foregoing constituted substantial evidence that Dao fired the fatal shots, as reflected in jury's findings that Dao personally used a firearm in the commission of the murder and that Lam did not use one.

Moreover, there was substantial evidence the killing was intentional. The victim was shot five times after being physically beaten by Asian Boyz members who converged on him from their two vehicles. During the assault on the victim, at least one of the Asian Boyz members said that the victim had been an Asian Boyz member who joined a rival gang. Some of Asian Boyz members asked the victim and his companions if they were members of Wah Ching, their rival gang. Dao and another gang member then said, "Fuck Wah Ching," at which point all the Asian Boyz members converged on the victim, and beat him. Ching also stated that the victim was an ex-Asian Boyz member who had joined the rival Wah Ching gang.

Such substantial evidence of planning activity involved in the victim's killing is typically an important indicator of the requisite premeditation and deliberation. *(People v. Alcala* (1984) 36 Cal.3d 604, 627.) There was also evidence of motive. Several days after the shooting, Dao told Yu the victim was a former Asian Boyz member. The victim in fact had a partially removed Asian Boyz tattoo on

his arm. Dao's arguable motive to kill the victim was thus that he had defected from the Asian Boyz gang and ostensibly had joined the rival Wah Ching gang. And, the manner in which Dao killed the victim --shooting him five times at close range -- was sufficiently particular and exacting to demonstrate that Dao acted according to a preconceived design to kill. (See *People v. Gallego* (1990) 52 Cal.3d 115, *190; People v. Caro* (1988) 46 Cal.3d 1035, 1050.)

Accordingly, there was substantial evidence to support Dao's conviction of first degree murder.

IV. The jury was properly instructed on the natural and probable consequence doctrine(CALJIC No.3.02),and there was no error infailing to instruct on involuntary manslaughter

A. Natural and probable consequence instruction

Lam contends the trial court erred in instructing the jury, pursuant to a modified version of CALJIC No. 3.02, that an aider and abettor is guilty of any crime committed by a principal which is the natural and probable consequence of other crimes originally aided and abetted. The natural and probable consequence doctrine of aider and abettor liability is "an 'established rule' of American jurisprudence." (*People v. Pretryman* (1996) 14 Cal.4th 248, 260.) It is based on the recognition that aiders and abettors should be responsible for the criminal harms that they have naturally, probably and foreseeably put in motion. *(Ibid.; People v. Luparello (*1986) 187 Cal.App.3d 410, 439.) Therefore, under the natural and probable consequence doctrine, an aider and abettor is guilty not only of the offense he intended to facilitate or encourage, but also of any

reasonably foreseeable offense committed by the person he aids and abets. *(People v. Prettyman, supra,* 14 Cal.4th at p. 261; *People v. Croy* (1985) 41 Cal.3d 1, 12; fn, 5.)

Contrary to Lam's contention, the instruction did not permit him to be convicted on the basis of his "ordinary negligence," rather than on the basis on proof beyond a reasonable doubt. As aptly observed in *People v. Smith (I* 997) 57 Cal,App.4th 1470, 1479, in the context of criminal negligence, the natural and probable consequence doctrine measures the foreseeability of the harm which makes an act culpable, and the doctrine occupies a similar role in the law of aiding and abetting. Unlike the present case, *Smith* dealt with criminal negligence. However, no reasoning or observation in *Smith* can be construed to support the notion that a person charged with a crime involving criminal negligence could be convicted on the basis of "ordinary negligence," rather than the required proof beyond a reasonable doubt.

Nor does the natural and probable consequence doctrine, as applied in the present case, create an improper irrebuttable presumption that Lam acted with malice, an element of the crime of second degree murder of which he was convicted. To establish liability as an aider and abettor, a jury must find the intent to encourage and bring about conduct that is criminal, rather than find the specific intent or any other element of the target offense committed by the principal. *(People v. Prettyman, supra,* 14 Cal.4th at p. 26 *1; People v. Croy, supra,* 41 Cal.3d at p. 12, fn. 5.) No presumption that Lam acted with malice as an aider and abettor could have occurred since the jury was not required to make such a finding under the challenged instruction. Rather, while the jury was required to find that Dao acted with malice before it could convict Dao of murder, it was not required to find that Lam acted with malice in order to

convict him of second degree murder as an aider and abettor of Dao. The jury was thus properly instructed pursuant to CALJIC No. 3.02.

B. Requested involuntary manslaughter instruction

Equally unavailing is Lam's contention that the trial court erred in failing to give the requested instruction on involuntary manslaughter. According to Lam, the evidence was susceptible of the interpretation that Lam aided and abetted Puppet in a misdemeanor battery, which Puppet perpetrated on the murder victim. However, there was no evidentiary basis for such an instruction.

Hui Huu Tieu was the only eyewitness who testified regarding the person referred to as Puppet. Tieu indicated that a young Asian male ran from the side of the pool hall building up to the phone booth where Vuong had just made a phone call. Vuong then said to the person who approached, "What's up, Puppet?" However, Tieu did not know if Puppet punched Vuong. Tieu thought that Puppet was one of Vuong's friends. However, Tieu also indicated that when the Honda was driven up to the area, Vuong was surrounded by three of its occupants and by the male who ran up from the side of the pool hall. These people ran toward Vuong. But before Vuong was punched, Vuong and Tieu hid behind a parked car.

Even assuming Puppet was one of the people who battered Vuong, resulting in bruises on his face, lips, legs and arms, such conduct would amount to a felony, not a misdemeanor battery. (Pen. Code, § 243, subd. (d).) Indeed, if Puppet had participated in the assault by means of force likely to produce great bodily injury on Vuong together with the others who were assaulting Vuong, he would have been equally liable for the murder of Vuong on

an aiding and abetting theory. With no factual basis for a mere misdemeanor battery, the court properly refused to instruct on involuntary manslaughter.

DISPOSTION

The judgments are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

s/
BOREN, P.J.

I concur:

s/
NOTT, J

People v. Lam et al.
No. B125477

Mallano, J., dissenting:

I am dissenting because I am of the opinion that *Lilly v. Virginia* (1999) 527 U.S ___, 144 L.Ed.2d 117 *(Lilly)* precludes the admission of Phan's statement to Sergeant Ortega as a declaration against penal interest. The prosecution's argument here is similar to that of the Commonwealth of Virginia's which was rejected by the United States Supreme Court in Lilly: "The Commonwealth's next proffered basis for reliability--that Mark knew he was exposing hiniself to criminal liability--merely restates the fact that portions of his statements were technically against penal interest, And as we have explained, such statements are suspect insofar as they inculpate other persons. '[T]hat a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts.' [Citation.]" (527 U.S. at pp.____, ____, 144 L.Ed.2d at pp. 135-136.) Here, while Phan admitted accompanying Lam and Dao to the scene where he held a stick or a pole while issuing a gang challenge, he does not admit any direct complicity in the homicide. However, he greatly damaged the defense of Lam and Dao by placing them at the scene, the latter with a firearm.

Further, I cannot agree that the error regarding the admission of Phan's statement was nonprejudicial. The other witnesses placing Lam and Dao at the scene were not without taint: Yu (an accomplice), Tran (a charged accomplice in a homicide case at the time of her testimony) and Quach (who lent his car to Yu on the date of the homicide to facilitate a robbery and obtain food).

s/

MALLANO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Second Appellate District, Division Two, No. B125477
S085230

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

THE PEOPLE, Respondent

SUPREME COURT

FILED

v.

MAR 15 2000
Frederick K. Ohlrich

HUNG XUONG LAM Et Al., Appellants

Appellants' petitions for review DENIED.

R. GEORGE,

Chief Justice

Supreme Court, U.S.
FILED

021861 JUN 12 2003

No.

IN THE

Supreme Court of the United States

HIEN AN DAO,

Petitioner

v.

C.A. TERHUNE, Director,
California Department of Corrections,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Sanford H. Perliss, Esq.
Counsel of Record
PERLISS & GROSS
555 S. Flower Street,
Suite 4520
Los Angeles, CA 90071
213-627-0218

24 pp

Table of Contents

	Page
Order Adopting Report and Recommendation of United States Magistrate Judge.....	App.34
Report and Recommendation of a United States Magistrate Judge.....	App.36

Table of Authorities

Page

Cases

California v. Green, 399 U.S. 149, 158 (1970)..... App.45
Christian v. Rhode, 41 F.3d 461, 468 (9th Cir. 1994)..... App.46
Brecht v. Abrahamson, 507 U.S. 619 (1993)..... App.52
Delaware v. Van Arsdale, 475 U.S. 673, (1986)..... App.50
Hernandez v. Small, ___ F.3d at ___, 2002 WL 356296..... App.46, 47
Hunter v. Aispuro, 982 F.2d 344, 348 (9th Cir. 1992), *cert. denied*, 510 U.S. 887 (1993)..... App.45
Lilly v. Virginia, 527 U.S. 116 (1999)..... App.46, 47
Maryland v. Craig, 497 U.S. 836, 845 (1990)..... App.46
Moore v. Calderon, 108 F.3d 261, 263 (9th Cir.), *cert. denied*, 512 U.S. 1111 (1997)..... App.43
Ohio v. Roberts, 448 U.S. 56 (1980)..... App.46
Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987)..... App.45
United States v. Bowman, 215 F.3d 951 (9th Cir 2000)..... App.50
Van Tran v. Lindsey, 212 F.3d 1143, 1153-54 (9th Cir.)..... App.44
Weeks v. Angelone, 528 U.S. 225, 234 (2000)..... App.50

Williams v. Taylor, 529 U.S. 362, (2000)..... App.44
Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)..... App.45

Constitutional Provisions

Sixth Amendment..... App.45

Statutory Provisions

Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA")..... App.43, 44

28 U.S.C. § 636..... App.34
28 U.S.C. § 2254..... App.43, 44, 45, 52

California Penal Code ("P.C.")
§ 186.22..... App.37
P.C. §§ 187(a)..... App.37
P.C. § 12022.5(a)..... App.37
P.C. § 12022(a)(1)..... App.37

SUPPLEMENTAL APPENDIX

ENTERED
CLERK, U.S. DISTRICT COURT
MAY 17 2002
CENTRAL DISTRICT OF CALIFORNIA

FILED
CLERK, U.S. DISTRICT COURT
MAY 16 2002
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HIEN AN DAO, Petitioner, vs. C.A. TERHUNE, Director, California Department of Corrections Respondent.	) Case No. CV 01-2422-) AHM(RC))) ORDER ADOPTING) REPORT AND) RECOMMENDATION) OF UNITED STATES) MAGISTRATE JUDGE))

Pursuant to 28 U.S.C. Section 636, the Court has reviewed the Petition and other papers along with the attached Report and Recommendation of United States Magistrate Judge Rosalyn M. Chapman, as well as petitioner's objections, and has made a de novo

determination.

IT IS ORDERED that (1) the Report and Recommendation is approved and adopted; (2) the Report and Recommendation is adopted as the findings of fact and conclusions of law herein; and (3) Judgment shall be entered denying the petition and dismissing the action with prejudice. The Court has corrected a typographical (name) error at p. 15:10, and the above three items are subject to that correction, which substitutes "Lam" for "Dao."

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation and Judgment by the United States mail on the parties.

DATE: May 16, 2002

s/

A. HOWARD MATZ
UNITED STATES
DISTRICT JUDGE

FILED
CLERK, U.S. DISTRICT COURT
MAR 2 2002
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HIEN AN DAO, Petitioner, vs. C.A. TERHUNE, Director, California Department of Corrections Respondent.	) Case No. CV 01-2422-AHM(RC))) REPORT AND) RECOMMENDATION OF) A UNITED STATES) MAGISTRATE JUDGE)))

This Report and Recommendation is submitted to the Honorable A. Howard Matz, United States District Judge, by Magistrate Judge Rosalyn M. Chapman, pursuant to the provisions of 28 U.S.C. § 636 and General Order 01-13 of the United States District Court for the Central District of California.

BACKGROUND

I

On July 21, 1998, in Superior Court for the County of Los Angeles case no. KA035193, petitioner Hien An Dao was convicted by a jury of the first degree murder of

Lin Bao Vuong in violation of California Penal Code ("P.C.") § 187(a), and the jury also found that petitioner personally used a firearm in the commission of the murder within the meaning of P.C. § 12022.5(a), that a principal was armed with a firearm in the commission of the murder within the meaning of P.C. § 12022(a)(1) and that the murder was gang-related within the meaning of P.C. §§ 186.22(b)(1) and 186.22(b)(4). Return to Petition for Writ of Habeas Corpus ("Return"), Exh.A at 31.[1] The petitioner was sentenced to 25 years to life, plus five years on the personal use of a firearm enhancement, for a total term in state prison of 30 years to life. Id. At 32.

The petitioner appealed his conviction to the California Court of Appeal, which in an unpublished opinion filed December 13, 1999, affirmed the judgment; however, Judge Mallano was of the opinion the judgment should be reversed. Return, Exh. B. On January 21, 2000, petitioner, through his counsel, filed a petition for review in the California Supreme Court, which was denied on March 15, 2000. Return, Exh. C.

II

The California Court of Appeal, in affirming the petitioner's conviction, made the following findings regarding his and Lam's case:[2] The Asian Boyz gang and the Wah Ching gang are criminal street gangs, which in 1994 were rival gangs at war with each other. In January of 1994, Dao, Lam, Jason Ching ("Ching") and Sat

---

1. The petitioner was jointly tried with co-defendant Hung Xuong Lam.

2. See Return, Exh. B at 36-39.

Tai Yu ("Yu") were members of the Los Angeles chapter of the Asian Boyz gang. A member of the Wah Ching gang had recently shot Yu in the leg. During that January, Dao, Lam, Ching, Yu and Jimmy Quach ("Quach")(who associated with the Asian Boyz gang but was not a member) "partied" for a couple of weeks in a room at the Travel Lodge Motel on Colorado Boulevard in Pasadena.

On January 21, 1994, Lam had a small semiautomatic handgun in the motel room. He shared the gun with Dao. They would not let anyone else touch the weapon. Ching and another person in the motel room also had a gun. At approximately 8:00 p.m. that evening, Yu asked Quach if he could borrow Quach's car, a blue Honda. Quach agreed, and Yu said he was going to get some food for the group and to rob a car so they would have money for the motel room and other expenses.

Yu drove away with Quach's car and was accompanied by Lam and Dao and another member of the Asian Boyz named John. Yu observed that both Lam and Dao had guns in their possession. Yu drove the Honda and followed a van driven by another member of the Asian Boyz named Player. Other Asian Boyz gang members, Ching, Quong Phan ("Phan"), Peter, Vincent, Teaser, and Hitman, were also in the van. Yu followed the van to the Pasadena Arcade, and soon thereafter followed it to the Arroyo Pool Hall in El Monte.

Huy Huu Tieu ("Tieu"), his uncle Mark, Lin Bao Vuong (also known as Mike), Tan Vuong, and two girls, Kim and Linn, had arrived at the pool hall at approximately 8:30 p.m. While they were shooting pool, Lin Bao Vuong received a page on his pager from one of his friends. Lin

Bao Vuong, Tieu, Tan Vuong and a person referred to as Hoan then went outside to a telephone booth near the pool hall door, and Lin Bao Vuong made a telephone call.

While Lin Bao Vuong was speaking on the phone, Yu drove into the pool hall parking lot. He stopped the Honda in front of the phone booth after Lam told him to stop the vehicle. Everyone inside the Honda identified himself as associated with the Asian Boyz and asked Tieu, Lin Bao Vuong, and the others at the phone booth if they were from Wah Ching. John and Dao got out of the Honda. Dao held a semiautomatic handgun, and John made motions in the area of his waistband as if he had a weapon there. Dao and John both said, "Fuck Wah Ching." When Tieu protested he was not from Wah Ching, Dao and John got back inside the Honda.

The Honda was driven away from the phone booth, but then backed up and returned to the area. A young Asian male ran from the side of the pool hall building up to the phone booth. Lin Bao Vuong said, "What's up, Puppet?" All the occupants of the Honda got out and went with Puppet to where Tieu and Lin Bao Vuong were standing. One of the people from the Honda demanded that Tieu give him his pager and money. Tieu handed over his pager but did not have any money with him.

Tieu ran away after he saw one of the people punch Lin Bao Vuong. Ching ran up from the van and also punched Lin Bao Vuong in the body and face. As Ching punched him, he stated, "Ex-Asian Boyz" and asserted Lin Bao Vuong had joined the Wah Ching gang. Yu and two other Asian Boyz members also joined in hitting Lin Bao Vuong. Meanwhile, Phan held a stick or pole as he

challenged a person near the entrance to the pool hall, asking him what gang he was from.

Yu walked back to the Honda and told Dao and Lam to leave. Lam fired two shots into the air, and Dao turned around and fired one to three shots. Lam and Dao got back into the Honda, and then both the Honda and the van returned to the Travel Lodge Motel.

That evening at approximately 10:00 p.m., El Monte Police Officer Dennis Miller arrived at the Arroyo Pool Hall and observed Lin Bao Vuong lying on the ground near the phone booth outside the pool hall. He was still alive, and paramedics were called to the scene. Officer Miller found three expended small caliber bullet casings in the parking lot near the victim. Thereafter, El Monte Police Detective Kenneth Whary arrived at the scene and observed, in addition to the three expended .25 caliber casings found by Officer Miller, an expended bullet on the ground.

At the Travel Lodge Motel that evening, Quach observed that Dao was jumpy and excited and that Lam was rather quiet. Lam had a gun, and Quach saw him hide the weapon in a laundry bag in the motel room. Dao yelled out that no one should say anything or he would kill him. Dao also said that in case anyone asked, they should say that Puppet from the Hellside gang did it. Dao also indicated that the whole group, including Lam and Ching, had been at the Arroyo Pool Hall. While the people in the motel room were talking, Quach heard them say they thought the victim was Mike or Mickey.

Several days later Dao told Yu that he had thrown

his gun in the sewer. Yu asked Dao what had happened. Dao replied, "Ex-Asian Boyz." Dao also said, "I think I shot him." Sometime after Lin Bao Vuong had been shot,, Tam Tran ("Tran"), a girlfriend of one of the Asian Boyz, was present in the motel room at the Travel Lodge Motel. She heard Lam say he had shot "the guy" at close range with a .22 or .25 caliber gun, and that the person who got shot was an ex-Asian Boyz member who had joined the Wah Ching gang.[3] Lam and Dao also told Tran that they were together when it happened, and they had used a Honda Accord. Dao further indicated to Tran that at the time of the incident there were some young girls in front of the pool hall.

On January 24, 1994, Detective Whary returned with his partner to the scene of the shooting. They discovered on the ground two additional expended bullets. Lin Bao Vuong had died from a gunshot wound to the head. An autopsy indicated he had several bruises about his body and five gunshot wounds, including a fatal through-and-through wound to the head. The bullet entered the left back of his head and exited at his right eyebrow. Lin Bao Vuong also sustained one bullet wound to the left arm, one wound to the left thigh, and two wounds to the right thigh. The coroner also observed a partially removed Asian Boyz tattoo on one arm. Lin Bao Vuong was 14 years old at the time he was killed.

---

3. On cross-examination, Tran testified it was Dao, not Lam, who had told her that they killed a person with a .22 or .25 caliber handgun. At the time of her testimony, Tran was on probation for her role as an accomplice in the so-called San Marino murder case, in which two people had been killed.

In October of 1994, Los Angeles County Sheriff Sergeant Rudy Ortega interviewed Quach. Quach stated that Dao had told him that Dao had shot the victim and had gotten away with it, Sergeant Ortega thereafter interviewed Yu, who stated he had seen Lam in possession of a black .22 caliber automatic before anybody left Quach's vehicle. Ballistics tests disclosed that the expended bullets found at the scene of the shooting and the two bullets recovered from the victim's body were .25 caliber bullets, which could have been fired from the same gun.

Los Angeles County Sheriff Sergeant William Howell testified at trial as an expert on Asian gangs in Los Angeles County. According to him, Asian Boyz gang members would not spontaneously engage in a violent act. Assuming members of that gang were involved in the homicide of Lin Bao Vuong, Sergeant Howell opined they committed the crime to promote the Asian Boyz gang by instilling fear in any rival gang and giving the Asian Boyz respect.

In Dao's and Lam's defense at trial, Kenneth Chang, an acquaintance of Dao's defense counsel, indicated that it is possible to join the Asian Boyz gang and thereafter leave the gang. A person could leave the gang by getting "jumped out," meaning leaving after several older boys beat up the departing gang member. Chang had left the gang after approximately a year and knew of several others who also were former Asian Boyz members. While Chang was a member, it was primarily a social group and did not engage in major crimes.

III

On March 31, 2001, petitioner, through his attorney,

filed the pending petition for writ of habeas corpus, which raises the sole claim that the "admission of the nontestifying accomplice's [Phan's] statement to law enforcement while in custody, to prove petitioner's guilt, violated his Confrontation Clause Rights." Petition at 6. On May 8, 2001, the respondent filed an answer, and the petitioner filed a traverse on July 11, 2001.

DISCUSSION

IV

The petitioner's claims must be considered in light of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"), which worked substantial changes to the law of habeas corpus. Moore v. Calderon, 108 F.3d 261, 263 (9th Cir.), cert. denied, 512 U.S. 1111 (1997). Of specific importance to the petitioner's claim are the revisions made to 28 U.S.C. § 2254(d), which now provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The United States Supreme Court has clarified the meaning of the key clauses in Section 2254(d):

> Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the [petitioner's] case.

Williams v. Taylor, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000); see also Van Tran v. Lindsey, 212 F.3d 1143, 1153-54 (9th Cir.)([A]n 'unreasonable application of clearly established federal law [occurs] when [this Court's] independent review of the legal question does not merely allow [it] ultimately to conclude that the petitioner has the better of two reasonable legal arguments, but rather leaves [the Court] with a 'firm conviction' that one answer, the one rejected by the [state] court, was correct, and the other, the application of the federal law that the [state] court adopted, was erroneous -- in other words that clear error occurred."). cert.denied, 531 U.S. 944 (2000).

Further, under the AEDPA, a federal court shall presume that the determination of a factual issue made by a state court is correct, and the petitioner has the burden of

rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The California Supreme Court reached the merits of petitioner's claims when it denied his petition for review without citation to authority or a written opinion. Hunter v. Aispuro, 982 F.2d 344, 348 (9th Cir. 1992), cert. denied, 510 U.S. 887 (1993). However, "where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground," Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S.Ct. 2590, 2594,115 L.Ed.2d 706 (1991). Thus, in addressing petitioner's claims, this Court will consider the reasoning of the California Court of Appeal, which issued a written decision.

V.

The Confrontation Clause of the Sixth Amendment provides that "[in] all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend. VI. The confrontation clause of the Sixth Amendment provides a criminal defendant with the right to face those who testify against him and the right to conduct cross-examination. Pennsylvania v. Ritchie, 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987). The right to confront a witness serves the purposes of insuring reliability by means of oath, exposing the witness to cross-examination, and permitting the trier of fact to weigh the demeanor of the witness. California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 28 L.Ed.2d 489 (1970). "The central concern of the Confrontation Clause is to ensure the reliability of the

evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Maryland v. Craig, 497 U.S. 836, 845, 110 S.Ct. 3157, 3163, 111 L.Ed.2d 666 (1990), Christian v. Rhode, 41 F.3d 461, 468 (9th Cir. 1994).

A defendants right to confrontation, however, is not absolute, In Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Supreme Court formulated a two-part test for determining the admissibility in a criminal proceeding of an out-of-court statement. "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case, . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. Id. at 65, 100 S.Ct. at 2538. Second, once the declarant is shown to be unavailable, the prior testimony is admissible "only if it bears adequate 'indicia of reliability.' Reliability can be inferred . . . where the evidence falls within a firmly rooted hearsay exception . . . [or contains] particularized guarantees of trustworthiness." Id. at 66, 100 S.Ct. at 2539; Llly v. Virginia, 527 U.S. 116, 124-25, 119 S.Ct. 1887, 1894, 144 L.Ed.2d 117 (1999); Christian, 41 F.3d at 467.

The United States Supreme Court in Lilly "was directly presented with the question whether the declaration against penal interest exception to the hearsay rule constitutes a firmly rooted exception." Hernandez v. Small, ___ F.3d at ___, 2002 WL 356296, *4. The Ninth Circuit has noted that in Lily, the plurality of the Supreme Court divided the declaration against penal interest exception to the hearsay rule (which the California Court of Appeal found applicable here) into three subcategories;

> (1) voluntary admissions against the declarant; (2) exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense, and (3) evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant. In the third subcategory, . . . the plurality concluded that declarations against penal interests 'are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence,' where the statements are 'accomplices' confessions that inculpate a criminal defendant.'

Id. at *4-5 (citing Lilly, 527 U.S. at 127, 134). As to the third subcategory of statements, the Ninth Circuit further noted that the plurality of the Supreme Court explained that within that subcategory "a certain further subset of statements, i.e., statements which attempt to shift or to spread blame by inculpating both the accomplice and the defendant, is inherently untrustworthy." Id. At *7 (citing Lilly, 527 U.S. at 131). The Ninth Circuit in Hernandez then distinguished that subset of the third subcategory statements from the situation before it.

Let us now look at Phan's statements, which the California Court of Appeal summarized, as follow:

> Phan[ ] acknowledg[ed] that he was one of the passengers in the van which left the motel and eventually drove to the Arroyo Pool Hall. Phan told Sergeant Ortega the names of the people in the van with him and that Dao was armed with a .38 caliber semiautomatic pistol. Accompanying the van was

> the Honda, in which Dao, Lam, Yu and anothor person rode. When Phan was at the pool hall, he saw Dao waving the gun inside the Honda. He also saw the people from the Honda approach those by the phone booth. Ching got out of the van and ran over to the group by the phone booth, while Phan went to the entrance of the arcade, held a stick or pole, and issued a gang challenge to someone at the entrance by asking what gang he was from. [¶] Phan further related to Sergeant Ortega that Ching hit one of the people in the group by the phone booth. Someone from Phan's group also took a pager from one of the people in the group by the phone booth. Phan then heard gun shots, but he did not tell Sergeant Ortega who fired the shots. Phan asserted he did not see Lam shoot a gun, hold a gun, or run away.
>
> Return, Exh. B at 40 n.4.

The California Court of Appeal, first, found that Phan was "unavailable" as a witness,[4] Id. at 41. Second, the California Court of Appeal analyzed Lilly and properly concluded that Phan's statements, as an accomplice's statements against penal interest, did not come within a "firmly rooted" hearsay exception for the purposes of confrontation clause analysis. In fact, Phan's statements come within Lilly's third subcategory of statements, but not within the subset which is inherently untrustworthy because it attempts to shift the blame to the defendant. Thus,

---

4. Neither petitioner nor respondent challenges the state court's determination that Phan was unavailable as a witness.

although not coming within a firmly rooted exception to the hearsay rule, Phan's statements are not inherently untrustworthy.

To determine the trustworthiness of Phan's statements, the California Court of Appeal considered the circumstances surrounding Phan's statements to determine whether they bore "particularized guarantees of trustworthiness." Specifically, the California Court of Appeal found that "Sergeant Ortega did not make any provision of leniency [to Phan] when Phan made the statements. . . ." Id. at 44 n. 6. The Court of Appeal further found:

> Phan was subpoenaed as a witness by the prosecution in the present case. The prosecutor had drafted a letter addressed to the Board of Prison Terms which stated that Phan had testified truthfully in the present case and this testimony was extremely helpful [to] the prosecution. The prosecutor advised Phan that he would send this letter if in fact Phan cooperated. He also advised Phan that in the event Phan refused to testify he would send a letter to the Board of Prison Terms advising them [sic] of Phan's failure to cooperate. Phan's refusal to testify thus could indicate his prior statements to the officer were not "motivated by a desire to curry favors with the authorities." He, in fact, exposed himself to the prosecutor's damaging letter to be sent to the Board of Prison Terms by his refusal to testify at trial.

Id. Inferentially, the Court of Appeal then determined that Phan's statements had "indicia of reliability" because, in part, "[t]he statements were sufficient to subject Phan to

criminal liability for the murder of Lin Bao Vuong as an aider and abettor in [Lam's and Dao's] killing of Vuong." Id. at 42-43 (citations omitted).

Moreover, the admission of Phan's statements did not violate petitioner's rights under the confrontation clause because the jury was instructed that Phan was an accomplice as a matter of law and that his testimony should be viewed with caution, and that they may only consider his testimony if it was corroborated by other evidence. Reporter's Transcript ("RT") 1001:24-1004:11. This court must assume that the jury followed its instructions and gave no weight to Phan's statements unless the jury found they were corroborated by other independent evidence. Weeks v. Angelone, 528 U.S. 225, 234, 120 S.Ct. 727, 733, 145 L.Ed.2d 727 (2000) ("[a] jury is presumed to follow its instructions"). Under these circumstances, Phan's statements did not harm petitioner.

Finally, "[a] Confrontation Clause violation is subject to harmless error analysis. Delaware v. Van Arsdale, 475 U.S. 673, 681-84, 106 S.Ct. 1431, 89 L.Ed. 2d 674 (1986); United States v. Bowman, 215 F.3d 951, 961 (9th Cir 2000). In assessing whether a violation of the confrontation clause was prejudicial, courts should consider the importance of the testimony to the entire case, whether the testimony was cumulative, whether corroborating or contradictory evidence existed, and the overall strength of the government's case. Van Arsdale, 475 U.S. at 684, 106 S.Ct. at 1438.

The California Court of Appeal concluded that any error in admitting Phan's statements was harmless:

We find that even assuming arguendo error regarding the admission of Phan's statements through the testimony of Sergeant Ortega, any error was nonprejudicial. [Lam and Dao] emphasize that Phan placed [them] at the crime scene and Dao was the only person Phan claimed to see armed. Yu had been granted immunity and was an accomplice. Nonetheless, Yu testified that both Dao and Lam fired shots just after Vuong was beaten. Nonaccomplice Tran testified that Dao told her he and Lam had killed a person with a .22 or .25 caliber handgun. A bullet from a .25 caliber gun in fact killed Vuong. Nonaccomplice Quach testified that after the fatal shooting, he saw Lam hide a gun in a laundry bag in the motel room, and Dao yelled that no one should say anything or he would kill him. Dao also said the entire group, including Lam and Ching, had been at the Arroyo Pool Hall. Several days later, Dao told Yu that he had thrown his gun in the sewer. When Yu asked Dao what had happened, he replied "Ex-Asian Boyz," and said, "I think I shot hlm." Quach told Sergeant Ortega that Dao told him that Dao shot the victim and got away with it. Quach was not an accomplice or involved in any pending criminal matter. [¶] We also note that Sergeant Ortega's testimony about Phan's statement was, in view of the testimony of other witnesses, actually of some assistance to [Lam and Dao]. Phan placed Dao at the scene waving a gun around. However, Phan indicated that Dao was in possession of a .38 caliber gun (not a .25 caliber gun), and that he did not see who fired the shots. Phan also indicated he did not see Lam with a gun. Indeed, consistent with Phan's testimony, the jury

> found Lam had not used a weapon and was convicted of the lesser offense of second degree murder. [¶] Under such circumstances, it is most unlikely the jury would have rendered a verdict more favorable to [Lam and Dao] if Sergeant Ortega had not testified at all regarding Phan's statements to him. Accordingly, even assuming arguendo error in admitting Sergeant Ortega's testimony about Phan's statements to him, under any standard of review its admission would be harmless.

Id. at 44-45 (citations omitted).

Here, Phan's statements that petitioner and Dao were carrying guns when they went to the Arroyo Pool Hall, that both were present when shots were fired, and that upon returning to the hotel Dao admitted he had shot Vuong, were consistent with the testimony of Yu, Tran and Quach. See, e.g., RT 402-415, 628-680, 788. Thus, Phan's statements were incriminating to petitioner only in confirming that petitioner was armed and was at the scene of the shooting -- evidence also provided by the testimony of other witnesses. Moreover, the prosecution did not comment at length or unduly focus on Phan's statements. For all these reasons, the admission into evidence of Phan's statements, even if error, was harmless. Brecht v. Abrahamson, 507 U.S. 619, 622, 113 S.Ct. 1710, 1714, 123 L.Ed.2d 353 (1993).

Thus, the California Supreme Court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1).

RECOMMENDATION

IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; (2) adopting the Report and Recommendation as the findings of fact and conclusions of law herein; and directing that Judgment be entered denying the petition and dismissing the action with prejudice.

DATE: March 21, 2002 s/

ROSALYN M. CHAPMAN
UNITED STATES
MAGISTRATE JUDGE

Sanford H. Perliss, Esq.
Counsel of Record
PERLISS & GROSS
555 S. Flower Street,
Suite 4520
Los Angeles, CA 90071
213-627-0218